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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 28

STATE OF TEXAS AND J. C. CLOPTON & BULLOCK HYDER, RECEIVERS,

Petitioners.

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 890

STATE OF TEXAS AND J. C. CLOPTON & BULLOCK HYDER, RECEIVERS,
Petitioners and Appellants and Appellee Below,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR,
Respondent and Appellee and Appellants Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petition of the State of Texas and J. C. Clopton and Bullock Hyder respectfully shows to this Honorable Court:

Statement of the Case.

The State of Texas instituted two suits in two of its own courts against respondent and others. The first suit sought the recovery of fines and penalties imposed upon specifically named violators of its oil conservation statutes (R. 118), for foreclosure of a statutory lien and the appointment of

receivers in aid of such foreclosure (R. 119), the lien statute invoked providing that the State shall have a lien "from the date that suit shall be instituted", and that the institution of such suit "shall constitute notice of such lien." Article 1372, Revised Statutes of Texas, under the same title and chapter, (Title 32, Ch. 6, Revised Statutes of Texas) which creates a lien, provides that "whenever any domestic or foreign corporation in this State shall violate any law of this State, * * * for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this State at the time of such violation, or which may thereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties and for cost of suit and cost of collection." (See Appendix A.)

The second suit against respondent and others sought the recovery of taxes and penalties fixed by statute and which had accrued and were delinquent as a result of respondent's refining, processing, blending and sale of motor fuel, also for the foreclosure of a statutory lien securing such taxes and the appointment of receivers in aid of such lien foreclosure (R. 120). (For Taxing Act see Appendix B.)

The first suit on behalf of the State was filed October 12, 1935. Citation and notice were issued in due course directing respondent to appear on October 19, 1935, and show cause why receivers should not be appointed (R. 118-119). On the appearance day appointed, the respondent made default. On October 25, 1935, the State Court appointed receivers and directed them to take into their charge all of the properties of respondent. On October 20th, the receivers qualified and actually took charge of respondent's properties (R. 119-120).[1]

The second suit by the State seeking the recovery of motor fuel taxes amounting to $104,084.97 and by later amend-

[1] (See Findings of Fact of Trial Court I, II, III, IV and V, R. 118-120.)

ment increased to over $300,000.00, was filed December 14, 1935, in another State Court, naming respondent and others as parties defendant. The State in this suit sought the foreclosure of a statutory lien, and prayed for appointment of receivers in aid of the lien foreclosure. The district judge declined to appoint receivers in this suit because receivers appointed in the State's first suit were in possession of the properties of respondent. However, citation and notice were issued in due course and service thereon was had (R. 120-121).[2]

On January 8, 1936, the tax suit (the State's second suit) was transferred by the State to the court wherein the penalty suit (the State's first suit) was pending, and on the same day the receivers appointed in the first suit were appointed and qualified in the second suit.

December 18, 1935, respondent filed in the District Court for the Northern District of Texas his petition for corporate reorganization under Section 77-B of the Bankruptcy Act as amended (11 U. S. C. A. 207). The District Judge found that the petition was filed in good faith and approved the same as properly filed. At the same time respondent (debtor) filed a plan of reorganization. The Court appointed a Trustee who qualified and demanded of and received from the State Court receivers such properties as had been taken possession of by them. This was done on December 19, 1935 (R. 121-122). January 13, 1936, petitioners filed pleas to the jurisdiction of the Bankruptcy Court, and subject to such pleas alleged that the petition for reorganization was not filed in good faith, setting forth grounds demonstrating that the plan as proposed was not feasible, and that the petition should be dismissed. The court overruled the pleas and motion.[3]

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[2] (See Findings of Fact of Trial Court VI, VII, and VIII, R. 120-121.)

[3] Other proceedings were had which are not material here.

Later, since the State Court pursuant to the suits filed by the State had appointed receivers to aid the lien foreclosure and the jurisdiction of the res was in the State Court before the filing of the petition for reorganization under Section 77-B, the State Court, upon motion of receivers, entered its order directing them to go into the Bankruptcy Court and petition it for a return of respondent's properties previously held by them, and also to relate to the Bankruptcy Court that this action was to avoid unseemly conflicts between two courts of coordinate jurisdiction. This plea to the jurisdiction, after the court had entertained it and heard argument thereon, was denied.

Simultaneously with the filing of this jurisdictional plea and subject thereto, the State through its Attorney General asked leave of the Bankruptcy Court to institute confiscation proceedings in one of its own courts, alleging that the oil located upon respondent's refinery site, and which was previously held by the State Court receivers, was illegal as defined by the Texas Statutes, and consequently was subject to confiscation as provided by statute (R. 126). The court denied this motion. Exception was duly taken. Petition for appeal and an assignment of errors was filed, the petition for appeal was allowed, and the appeal was duly perfected to the Circuit Court of Appeals for the Fifth Circuit (R. 6-7). (For Confiscation Act see Appendix C.)

Respecting the questions presented upon the appeal, the Circuit Court as to the first suit said:

> "In the first suit, the lien relied upon by appellants came into existence through legal proceedings. It was the filing of the suit which created the lien. The statute provides that the State shall have a lien 'from the date that suit shall be instituted,' and that the institution of such suit 'shall constitute notice of such lien' (Art. 1373, *supra*). Having been obtained through legal proceedings within four months prior to the filing of the petition, it must be deemed null and void under

Sec. 67f of the Bankruptcy Act (11 U. S. C. A. 107f); and the property affected by such lien shall be deemed wholly discharged and shall pass to the trustee as part of the estate of the bankrupt. In re Obergfoll, 239 Fed. 850; Globe Bank *v.* Martin, 236 U. S. 288, 59 L. Ed. 583; In re Diamond's Estate, 259 Fed. 70; In re Greyling Realty Corporation, 74 Fed. (2) 734 Certiorari denied, 294 U. S. 725; Moore *v.* Garaguez, 83 Fed. (2) 139." (R. 157.)

Regarding the second suit the Circuit Court held:

"In the case before us, if the state court in the second suit, instead of declining to appoint a receiver prior to bankruptcy, had appointed a receiver and directed him to apply to the court in the first suit for possession of the property, when the first court should release it from custody, it would then probably have obtained priority over the bankruptcy proceeding, but, by declining to appoint a receiver, it released its claim to the custody of the property when the proceedings in the first suit were invalidated, and left the way open for the jurisdiction of the bankruptcy court to attach to it. * * *" (R. 158.)

"By declining to appoint any receiver or to issue any other process to take charge of the property, the state court's jurisdiction in the second suit did not attach upon the filing of the bill because it was not a case 'where process subsequently issued in due course.' We find no error in the orders assailed by the appellants, and they are affirmed." (R. 159.)

the majority holding that, since the court in the second suit declined to appoint receivers, process did not issue in due course, notwithstanding the fact that the record discloses that "citation and notice were duly issued * * * and service thereon was had."[4]

Respecting the State's right to confiscate the illegal oil in one of its own tribunals, the Circuit Court held:

[4] (See Findings of Fact of Trial Court VIII, R. 121.)

"Aside from the lien, the State contends that it should be permitted to proceed to confiscate alleged illegal oil under the provisions of the Texas Confiscation Act. Unlawful oil is defined by par. d of Sec. 1 of Art. 6066(a) of the Revised Statutes of Texas as 'oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission, and oil which has been produced within the State in violation of any law of said state or in violation of any order of the Commission, and shall include any oil transported in violation of any such law or in violation of any such order.'

"The Confiscation Act declares such oil a nuisance and directs that it shall be forfeited to the State as thereinafter provided. It sets out the court procedure necessary to obtain a judgment of forfeiture and of authorization of seizure and sale of the products, as personal property is sold under execution. It provides further that the money realized from the sale of any such unlawful oil or products shall be applied, first, to the payment of the cost of suit and expenses incident to the sale of such products, after such expenses have been approved by the court, and that all funds then remaining shall be remitted forthwith to the State Treasurer and shall be by the Treasurer placed to the credit of the General Revenue Fund of the State of Texas. The validity of this act is assailed as unconstitutional and void, but we deem it unnecessary to decide this contention. The oil was valuable property; it was not a nuisance per se; the title to it was in the debtor at the time the petition for reorganization was filed; and it passed to the trustee as part of the debtor's estate. It is now properly in the custody of the bankruptcy court." (R. 157-158.)

The motions of the State to have dissolved the injunctions issued restraining the prosecution of the State's two suits were granted (R. 124),[5] the respondent and the bankruptcy

[5] (See Findings of Fact of Trial Court XIV, R. 124.)

trustee excepted and prosecuted cross appeals to the Circuit Court. That court affirmed these orders (R. 160).

The presiding Judge (Hutcheson) dissented from the majority opinion concerning what was said in *Pennsylvania Company* v. *Pennsylvania,* 294 U. S. 189, as to the question of whether process was issued in due course in the State's second suit so as to place exclusive jurisdiction of respondent's (debtor) properties in the State Court, thereby rendering the Bankruptcy Court under Section 77-B without jurisdiction or authority to dispossess the State Court receivers of the properties of respondent. The dissenting judge in regard to this question said:

> "The authorities the opinion cites lead, I think, to a conclusion exactly the opposite of that the opinion announces, that because the court declined to appoint receivers it did not acquire jurisdiction over the property. They make it clear, I think, that in case of suits to foreclose a lien, valid as well after as before the institution of bankruptcy proceedings, 'jurisdiction attaches upon the filing of the bill of complaint in court, at least where process subsequently issues on a bill in due course.' Penn. Co. *v.* Pennsylvania, 294 U. S. 189; Harkin *v.* Brundage, 276 U. S. 43-5; Metcalf *v.* Barker, 187 U. S. 165; Palmer *v.* Texas Co., 212 Tex. 118; Farmers Loan & Trust Co. *v.* Lake Street, 177 U. S. 51. In this case process issued in due course. The majority opinion is, therefore, in error in stating that this is not a case where process subsequently issued in due course. The error of the majority arises, I think, from the mistaken view that the appointment of a receiver, or other process of seizure, is necessary to give jurisdiction. White Star Refining Co., 74 Fed. (2) 269, cited by the majority, announces, and the announcement is supported by uniform authority, 'that the foreclosure of a lien not invalidated by bankruptcy on specific property *undertaken in a state court with or without receivership is unaffected by the subsequent filing of a bankruptcy petition against the owner of the prop-*

erty, and that the bankruptcy court as to that property has not paramount jurisdiction but only concurrent jurisdiction and must observe due comity is now well settled.' (Italics mine.)'' (R. 161.)

The dissenting judge also stated that the majority were in error in their holding that the State should be denied the right to proceed in confiscation in a State Court (R. 162-163).

Your petitioners filed a petition for rehearing (R. 165-171) and therein specified the errors committed by the Circuit Court in its opinion and judgment.

Reasons Relied on for Allowance of Writ.

1. The Circuit Court of Appeals has decided an important question of Bankruptcy Law under the provisions of Section 77-B of the Bankruptcy Act as amended (11 U. S. C. A., Section 207) which has not been, but should be, settled by this Court.

2. The Circuit Court of Appeals has sanctioned the exercise of jurisdiction of a Bankruptcy Court under the provisions of Section 77-B of the Bankruptcy Act as amended (11 U. S. C. A., Section 207) which was a departure from the usual course of judicial proceedings such as to call for an exercise of this Court's power of supervision.

3. The United States Circuit Court of Appeals has decided an important question of Federal law in a way in conflict with applicable decisions of this Court.

4. The United States Circuit Court of Appeals has erroneously held:

(a) That the lien of the State of Texas created by Article 1373 (See Appendix A) providing in part that the State shall have a lien ''from the date that suit shall be instituted'' and attaching to all property of any corporation

within the State of Texas at the time of the violation by such corporation of any law of the State and enacted for the purpose of securing the collection of penalties recovered by any judgment that may be rendered in favor of the State for the violation of State laws was a lien created by legal proceedings within four months prior to the filing of the petition for corporate reorganization under Section 77-B, and consequently was voided by Section 67-f of the Bankruptcy Act (11 U. S. C. A. 107-f). Such decision by the Circuit Court of Appeals is in conflict with the decision of this court in the case of *Henderson* v. *Mayer,* 225 U. S. 631.

(b) That the institution of the suit by the State of Texas to foreclose its statutory lien for taxes which was filed prior to the institution by the respondent (debtor) of proceedings in the Bankruptcy Court under Section 77-B and in which suit by the State of Texas citation had been duly issued and served upon respondent (debtor), but the State Court had refused to appoint a receiver upon the grounds that the same properties were in the possession of a receiver appointed by another State Court, there was no issuance of process in due course, and the filing of the suit did not confer upon the State Court exclusive jurisdiction over the properties of respondent (debtor) and the declining of the State Court to appoint receivers did not amount to the issuance of process in due course. The decision of the Circuit Court of Appeals is in conflict with the decisions of this court in *Farmers Loan & Trust Co.* v. *Lake Street Elvr. RR. Co.,* 177 U. S. 51, 61; *Peck* v. *Jenness,* 7 How. 612, 625; *Buck* v. *Colbath,* 3 Wall. 334, 341; *Wabash R. Co.* v. *Adelbert College,* 208 U. S. 38; *Palmer* v. *Texas,* 212 U. S. 118, 129; *Lion Bonding & Surety* v. *Karatz,* 262 U. S. 77, 89; *Harkin* v. *Brundage,* 276 U. S. 36, 43; *Penn. Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 195; and *United States* v. *Bank of New York & T. Co.,* 296 U. S. 463, 481;

and *Straton* v. *New*, 283 U. S. 318, 322, 327. The decision of the Circuit Court of Appeals is also in conflict with two of its own decisions in the cases of *Bryan* v. *Speakman*, 53 F. (2d) 1463; and *Re White Star Refining Co.*, 74 F. (2d) 269.

5. The Circuit Court of Appeals has decided an important question of Federal law respecting the provisions of Section 77-B of the Bankruptcy Act (11 U. S. C. A., 207) wherein the rights of a sovereign state have come in conflict with the exercise of jurisdiction by a court of the United States pursuant to the provisions of Section 77-B.

6. The Circuit Court of Appeals in respect of its holdings set forth above has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

7. The question of the right of a Court of the United States exercising functions authorized by the provisions of Section 77-B of the Bankruptcy Act and its assumed power to dispossess State Court receivers previously appointed pursuant to the filing of a penalty suit against respondent (debtor) on behalf of a sovereign state to vindicate its public policy respecting the conservation of its natural resources should be settled by this court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 8189, State of Texas *et al.*, Appellants and Appellee, *vs.* David Donoghue, Trustee of Trinity Refining Company, Debtor, Appellee and

Appellants, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed in so far as it affirmed the judgment of the District Court against the State of Texas *et al.*, appellants and appellee, and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem proper.

Respectfully submitted.

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Assistant Attorney General;
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 890

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDER, RECEIVERS,
Petitioners and Appellants and Appellee Below,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR,
Respondent and Appellee and Appellants Below.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 154) is reported in 88 F. (2d) 48. The findings of fact and conclusions of law of the District Court are found on pages 117-129 of the Record.

II.

Jurisdiction.

1. The opinion of the Circuit Court of Appeals for the Fifth Circuit is dated February 15, 1937 (R. 154). A peti-

tion for rehearing was seasonably filed March 3, 1937 (R. 165), and was denied on March 5, 1937 (R. 173); upon motion, stay of mandate was granted to expire within thirty days unless certificate of Clerk of this Court as to filing of petition, record and notice as required by Paragraph 3, Rule 38, of this Court has been filed with the Circuit Court Clerk.

2. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (U. S. C. A., Title 28, Section 347 (a) as interpreted in Rule 38, Subsection 5(b) of this Court).

3. The decision rendered by the Circuit Court of Appeals affirming the decree of the District Court denying relief to the State of Texas *et al.*, appellants and appellee in that court (petitioners here) in a proceeding in corporate reorganization under Section 77-B of the Bankruptcy Act as amended is in conflict with decisions of this Court holding that liens created by statutes but which are to be made effective by suit to foreclose within four months of the institution of the proceedings in bankruptcy are not liens created by judgments or such as have been obtained through legal proceedings. The present case is in conflict with *Henderson* v. *Mayer*, 225 U. S. 631.

4. The decision rendered by the Circuit Court of Appeals affirming the decree of the District Court denying relief to the State of Texas *et al.*, appellants and appellee (petitioners here) is in conflict with the decisions of this Court holding that where a State Court has entertained a suit seeking the foreclosure of a specific lien upon property given as security and where, citation and notice having issued in due course, and service of same having been procured upon the defendants in such suit, jurisdiction over the res set forth in the

State Court suit is in such State Court to the exclusion of all other courts. The present case is in conflict with the decisions of this Court in *Farmer's Loan & Trust Co.* v. *Lake Street Elvr. R. R. Co.*, 177 U. S. 51, 61; *Peck* v. *Jenness*, 7 How. 612, 625; *Buck* v. *Colbath*, 3 Wall. 334, 341; *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38; *Palmer* v. *Texas*, 212 U. S. 118, 129; *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 89; *Harkin* v. *Brundage*, 276 U. S. 36, 43; *Penn. Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 195; *U. S.* v. *Bank of New York & T. Co.*, 296 U. S. 463, 481; *Straton* v. *New*, 283 U. S. 318, 332; and *Duparquet, Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, 224.

5. The Circuit Court of Appeals has so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision because it has refused to follow the universal decisions of this Court and of the other Circuit Courts of Appeals holding that as between two courts of coordinate jurisdiction where a lien foreclosure suit in the State Court has been first filed and process having issued in due course, exclusive jurisdiction over the subject matter of the suit in the State Court is in such State Court and the Courts of the United States, whether sitting in bankruptcy or otherwise, will not interfere with the possession of the res by the State Court.

6. The Circuit Court of Appeals has decided a question of bankruptcy law under the provisions of Section 77-B of the Bankruptcy Act as amended against the right of the State of Texas pursuant to its own Constitution and Statutes to conserve its natural resources and to more effectively enforce its conservation laws in respect of the production and handling of crude petroleum oil and in rendering such decision has denied the right of the State of Texas to institute confiscation proceedings against illegally produced oil and to abate thoroughly the nuisance of

illegally produced oil by confiscating the same pursuant to Texas laws.

III.

Statement of the Case.

A full statement of the case has been given under the heading "Statement of the Case" in the petition which is hereby adopted and made a part of this brief.

IV

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the lien provided by Article 1373, Revised Statutes of Texas, which provides that in suits by the State of Texas against corporations seeking the recovery of penalties for violations of its laws the State shall have a lien "from the date that suit shall be instituted", is one created by judicial proceedings, and suit to foreclose same having been filed within four months prior to the filing of the petition under Section 77-B, such lien was, therefore, null and void under Section 67-f of the Bankruptcy Act (11 U. S. C. A. 107-f).

2. The Circuit Court of Appeals erred in holding that the State Court—in the suit by the State of Texas to recover delinquent taxes and to foreclose the statutory lien—in declining to appoint receivers lost jurisdiction over the property of respondent (debtor) upon the filing of the petition under Section 77-B notwithstanding the fact that citation and notice in the State's suit issued and service upon respondent (debtor) was had.

3. The Circuit Court of Appeals erred in holding that the oil originally held by the State Court receivers and which was in the hands of the Bankruptcy Trustee at the time of the filing of the State's motion seeking permission

to confiscate (subject to the jurisdictional pleas) was valuable property and rightfully in the hands of the bankruptcy trustee and in denying the right of the State of Texas to institute confiscation proceedings against same in a State Court.

V.

ARGUMENT.

1. The Circuit Court of Appeals erred in holding that the lien provided by Article 1373, Revised Statutes of Texas, which provides that in suits by the State of Texas against corporations seeking the recovery of penalties for violations of its laws the State shall have a lien "from the date that suit shall be instituted", is one created by judicial proceedings, and suit to foreclose same having been filed within four months prior to the filing of the petition under Section 77-B, such lien was, therefore, null and void under Section 67-f of the Bankruptcy Act (11 U. S. C. A. 107-f).

The State's suit for penalties (first suit) against respondent (debtor) was brought pursuant to Article 6036, Revised Civil Statutes as amended (see Appendix A) and was filed October 12, 1935 (R. 118), less than four months before the petition under 77-B was filed by debtor, which was on December 18, 1935 (R. 121). The State in this suit invoked the provisions of Articles 1372 and 1373. Those Acts are as follows:

> "Article 1372. (1193) Law violations.—Whenever any domestic or foreign corporation in this State shall violate any law of this State, including the law against trusts, monopolies and conspiracies or combinations or contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this State at the time

of such violation, or which may thereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties and for costs of suit and costs of collection. (Acts 1907, p. 175.)"

"Art. 1373. (1193) Lien, notice.—The State of Texas shall have a lien on all such property from the date that suit shall be instituted by the Attorney General or district or county attorney acting under his direction, in any court of competent jurisdiction within this State, for the purpose of forfeiting the charter or canceling the permit of such corporation, or for such fines or penalties. The institution of such suit for such fine, penalties or forfeiture, shall constitute notice of such lien. (Id.)"

The Circuit Court of Appeals decided that, inasmuch as Article 1373 provides that the State shall have a lien "from the date that suit shall be instituted" and that the institution of such suit "shall constitute notice of such lien", the same was obtained through legal proceedings, and consequently was voided by 67-f of the Bankruptcy Act (11 U. S. C. A. 107-f) upon the filing of debtor's petition under 77-B. Petitioners' contention is that the provisions of Article 1373 should be construed and given the same effect as the legislative act discussed and construed in *Henderson* v. *Mayer,* 225 U. S. 631, that is, the Texas act gives a right to a lien and is an inchoate lien.

We invite the Court to compare the two acts.

Georgia Code, Section 2795 in part declares:

"Landlords shall have a special lien for rent on crops made on land rented from them, superior to all other liens for taxes * * * and shall also have a general lien on the property of the debtor liable to levy and sale, and *such general lien shall date from the time of the levying of a distress warrant to enforce the same.*" (Italics ours.)

Texas Act, Article 1373, declares:

"The State of Texas *shall have a lien on all such property (of corporations) from the date that suit shall be instituted* by the Attorney General or district or county attorney acting under his direction, in any court of competent jurisdiction within this State, for the purpose of forfeiting the charter or canceling the permit of such corporation, or for such fines or penalties. The institution of such suit for such fine, penalties or forfeiture, shall constitute notice of such lien." (Italics ours.)

In respect of the Georgia Code, this Court said, in *Henderson* v. *Mayer*, 225 U. S. 634, at page 637:

> "The provisions of the bankruptcy act, preventing an insolvent from giving or the creditor from securing preferences for pre-existing debts, apply not only to mortgages and transfers voluntarily made by the debtor, but also to those preferences which are obtained through legal proceedings, whether the lien dates from the entry of the judgment, from the attachment before judgment, or, as in some states, from the levy of execution after judgment. But the statute was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice, and subject to which they are presumed to have contracted when they dealt with the insolvent.

"Liens in favor of laborers, mechanics, and contractors are of this character; and although they may be perfected by record or foreclosure within four months of the bankruptcy, they are not created by judgments, nor are they treated as having been 'obtained through legal proceedings,' even when it is necessary to enforce them by some form of legal proceeding. The statutes of the various states differ as to the time when such liens attach, and also as to the property they cover. They may bind only what the plaintiff has improved or constructed; or they may extend to all the chattels of the debtor, or 'all the property involved in the business.' Re Bennett, 82 C. C. A. 531, 153 Fed. 673.

"In some cases the lien dates from commencement of the work, or from the completion of the contract. In others, prior to levy they are referred to as being dormant or inchoate liens, or as 'a right to a lien.' Re Bennett, 82 C. C. A. 531, 153 Fed. 677; Re Laird, 48 C. C. A. 538, 109 Fed. 554. But the courts, dealing specially with bankruptcy matters, have almost uniformly held that these statutory preferences are not obtained through legal proceedings, and therefore are not defeated by Section 67f, even where the registration, foreclosure, or levy necessary to their completion or enforcement was within four months of the filing of the petition in bankruptcy."

Accordingly, we submit that the construction placed upon the Georgia Code should likewise be placed upon the Texas Act in this cause. It was evidently the intention of the legislature that such should be the construction for the reason that in Article 1372 it is provided:

"All properties of such corporation (violating State laws and subject to the imposition of penalties) within this State *at the time of such violation, or which may thereafter come within this State shall by reason of such violation, become liable for such fines or penalties and for costs of suit and costs of collection.*" (Italics ours.)

If it was the legislative intent to subject all properties of corporations to penalties and forfeitures "at the time of such violation," then it can hardly be conceived why the right to the lien provided for in Article 1373 should not likewise reach back and attach to such property "at the time of such violation" after the filing of the suit to recover penalties.

2. The Circuit Court of Appeals erred in holding that the State court—in the suit by the State of Texas to recover delinquent taxes and to foreclose the statutory lien—in declining to appoint receivers lost jurisdiction over the property of respondent (debtor) upon the filing of the petition under Section 77-B notwithstanding the fact that citation and notice in the State's suit issued and service upon respondent (debtor) was had.

The majority opinion of the Circuit Court of Appeals cites the language contained in *Penn. Casualty Company* v. *Pennsylvania,* 294 U. S. 189, 195, as impelling the conclusion that in the State's tax suit (second suit) process had not issued in due course which would enable the State Court to retain exclusive jurisdiction of the *res* as against invasion by the bankruptcy court. In respect of this holding the Dissenting Judge said:

> "The authorities the opinion cites lead, I think, to a conclusion exactly the opposite of that the opinion announces, that because the court declined to appoint receivers it did not acquire jurisdiction over the property. They make it clear, I think, that in case of suits to foreclose a lien, valid as well after as before the institution of bankruptcy proceedings, 'jurisdiction attaches upon the filing of the bill of complaint in court, at least where process subsequently issues on a bill in due course.' *Penn Co.* v. *Pennsylvania,* 294 U. S. 189; *Harkin* v. *Brundage,* 276 U. S. 45-5; *Metcalf* v. *Barker,* 187 U. S. 165; *Palmer* v. *Texas Co.,* 212 Tex. 118;

Farmers Loan & Trust Co. v. *Lake Street*, 177 U. S. 51. In this case process issued in due course. The majority opinion is, therefore, in error in stating that this is not a case where process subsequently issued in due course. The error of the majority arises, I think, from the mistaken view that the appointment of a receiver, or other process of seizure, is necessary to give jurisdiction. *White Star Refining Co.*, 74 Fed. (2) 269, cited by the majority, announces and the announcement is supported by uniform authority, 'that the foreclosure of a lien not invalidated by bankruptcy on specific property *undertaken in a state court with or without receivership is unaffected by the subsequent filing of a bankruptcy petition against the owner of the property, and that the bankruptcy court as to that property has not paramount jurisdiction but only concurrent jurisdiction and must observe due comity is now well settled.*' (Italics mine.)''

The Dissenting Judge voices our contentions in this regard, and, we believe, he makes it clear that the majority members of the Circuit Court of Appeals have misread the teachings of this Court in *Penn. Casualty Company* v. *Pennsylvania, supra.* Moreover, the Dissenting Judge points out that the Trial Court found as a fact that in the State's tax suit (second suit) ''citation and notice were duly issued and service thereon was had.'' (Findings of fact of Trial Court VIII, R. 161.)

Aside from this, petitioners contend that the cases of *Metcalf* v. *Barker*, 187 U. S. 165; *Straton* v. *New*, 283 U. S. 318, 333; and *Duparquet, Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, 224, should have controlled the decision of the Circuit Court of Appeals in respect of the State's tax suit wherein foreclosure of the tax lien was sought, this because it is not disputed that the statutory lien invoked by the State of Texas in its tax suit was in existence and had attached to respondent's properties more than four months before the filing of respondent's (debtor's) petition under

Section 77-B, and consequently could not have been rendered null and void under Section 67-f of the Bankruptcy Act (11 U. S. C. A., 107-f).

In this regard the Dissenting Judge (R. 161) points out the error of the majority in this language:

> "The error of the majority arises, I think, from the mistaken view that the appointment of a receiver, or other process of seizure, is necessary to give jurisdiction. *White Star Refining Co.*, 74 Fed. (2) 269 cited by the majority, announces, and the announcement is supported by uniform authority, 'that the foreclosure of a lien not invalidated by bankruptcy on specific property *undertaken in a state court with or without receivership is unaffected by the subsequent filing of a bankruptcy petition against the owner of the property, and that the bankruptcy court as to that property has not paramount jurisdiction but only concurrent jurisdiction and must observe due comity is now well settled.*' (Italics mine.)"

The opinion in *White Star Refining Company* (74 F. (2d) 269), was by the same court that decided this cause (Fifth Circuit) and the motor fuel tax law of the State of Texas was construed and applied in that case in such manner as to deny the right of a trustee in bankruptcy to dispossess State court receivers appointed by a State court which had entertained a suit on behalf of the State of Texas to collect motor fuel taxes and wherein the tax lien statute was invoked. The *White Star Refining Company* case was decided upon the principles announced in *Straton* v. *New* (283 U. S. 318, 333) *supra.*

It is significant that in *Duparquet, Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, this Court points out that Section 77-B does not make inapposite the principles announced in *Straton* v. *New, Metcalf* v. *Barker*, and other cases cited on page 222 of the *Duparquet* opinion.

3. The Circuit Court of Appeals erred in holding that the oil originally held by the State court receivers and which was in the hands of the bankruptcy trustee at the time of the filing of the State's motion seeking permission to confiscate (subject to the jurisdictional pleas) was valuable property and rightfully in the hands of the bankruptcy trustee and in denying the right of the State of Texas to institute confiscation proceedings against same in a State court.

The Circuit Court of Appeals in considering the motion of the petitioner, State of Texas, requesting leave to institute confiscation proceedings in one of its own courts against the oil in the hands of the bankruptcy trustee, and after referring to the provisions of the confiscation act (see Appendix C) declares:

> "The validity of this act is assailed as unconstitutional and void, but we deem it unnecessary to decide this contention. The oil was valuable property; it was not a nuisance *per se*; the title to it was in the debtor at the time the petition for reorganization was filed; and it passed to the trustee as part of the debtor's estate. It is now properly in the custody of the bankruptcy court."

In this aspect of the case the Dissenting Judge disagreed with the majority and said:

> "If the oil is 'unlawful oil,' and subject to condemnation, certainly by taking bankruptcy or by proceeding in reorganization, a willful violator may not change it into lawful oil. If the State was entitled to condemn it before the petition was filed, it was equally so entitled after it was filed. The proceeding to condemn is a special one; it must be followed exactly as provided for by the statute. *U. S.* v. *Smelser*, — F. (2) —; *Mingus* v. *Wadley*, 285 S. W. 1084. The bankruptcy court sitting in reorganization is not competent to inquire into or adjudge the condemnation. The re-

suit of the court's order in refusing permission to proceed, if effective to prevent the State's first proceeding, would be that the reorganization would proceed on the assumption that the oil was the debtor's property only to have that assumption disappear if in a condemnation suit filed after reorganization judgment went for the State. For it is perfectly plain that a proceeding, in which the question of whether the property is to be forfeited may not be tried and decided, cannot affect that question. Though, therefore, I am of the opinion that the bankruptcy court was without power to prevent the State's first proceeding with its suit to condemn, and that the State may proceed without permission, for the suit is not one *in rem*, and does not require the court to have possession of the property until the judgment of condemnation is entered, I think the State did the seemly thing in applying for permission, and that permission should have been granted as matter of course. If the oil is condemned while the property is still in the custody of the reorganization court, certainly that court can be depended upon in the exercise of the comity due between courts to surrender it on the State's writ for sale as the statute requires. I therefore dissent from the judgment of affirmance as to the condemnation proceeding."

The filing of the motion by the State seeking leave to institute such a confiscation suit in one of its courts was the only avenue open to it whereby it could effectually abate the nuisance of illegally produced oil. The State could not, by way of intervention in the bankruptcy court, accomplish the results sought to be attained under authority of its confiscation statute for the reason that the bankruptcy court has no jurisdiction to entertain a confiscation suit on behalf of the State seeking forfeiture of the oil because Article 6066a, Section 10 (see Appendix C) and cognate amendments under Title 102, Revised Statutes of Texas are penal in the international sense, and are not capable of being enforced in courts of the United States.

The penalty of forfeiture provided for results from violations of the conservation laws, and is visited upon violators in vindication of the State's policy in respect of its efforts to conserve its natural resources. Testing the statute by what is said in *Wisconsin* v. *Pelican Insurance Co. of New Orleans,* 125 U. S. 265, no other conclusion can be reached than that Article 6066a and related statutes are penal in the international sense. This decision follows the holding of Chief Justice Marshall in *The Antelope,* 10 Wheat. 66:

> "The courts of no country execute the penal laws of another."

Wisconsin v. *Pelican Insurance Co.* (125 U. S. 265) *supra,* is followed in *Huntington* v. *Attrill,* 146 U. S. 657, where the question of jurisdiction to enforce state penal laws is further discussed, the latter holding that the courts of the United States have no power to execute the penal laws of the individual states.[1]

The bankruptcy court should have granted the State leave to seek confiscation of the oil in question for the additional reason that, if it should prevail in its condemnation suit and establish the illegality of the oil, the forfeiture would take effect at the date of the commission of the unlawful act or acts connected with its production and handling, and title to same would at that time vest in the State of Texas although its title be not perfected until judgment of condemnation. Moreover, such forfeiture would constitute a statutory transfer of title to the oil to the State at the time the unlawful act or acts were committed, and the condemnation, when obtained, would relate back to that time and would void all intermediate sales and alienations, even to purchasers in good faith. This position is sus-

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[1] Compare *State of Indiana* v. *Alleghany Oil Co.,* 85 Fed. 870. *Leflar Extra State Enforcement of Penal and Governmental Claims,* 46 Harvard Law Review 193.

tained, we think, by the following decisions of this court: *United States* v. *1960 Bags of Coffee,* 8 Cranch. 298; *United States* v. *Stowell,* 133 U. S. 1; compare *Griswold* v. *President of the United States,* 82 F. (2d) 922.

Conclusion.

It is, therefore, respectfully submitted that this cause is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals and the decree of the District Court.

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APPENDIX A.

ARTICLE 1372. (1193) Law Violations.—Whenever any domestic or foreign corporation in this State shall violate any law of this State, including the law against trusts, monopolies and conspiracies or combinations or contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this State at the time of such violation, or which may thereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties and for costs of suit and costs of collection. (Acts 1907, p. 175.) (Title 32, Ch. 6, Revised Statutes of Texas.)

ART. 1373. (1193) Lien, Notice.—The State of Texas shall have a lien on all such property from the date that suit shall be instituted by the Attorney General or district or county attorney acting under his direction, in any court of competent jurisdiction within this State, for the purpose of forfeiting the charter or canceling the permit of such corporation, or for such fines or penalties. The institution of such suit for such fine, penalties or forfeiture, shall constitute notice of such lien. (Acts 1907, p. 175.) (Title 32, Ch. 6, Revised Statutes of Texas.)

ART. 6036. Penalty.—In addition to being subject to any forfeiture that may be provided for by law and to any penalty that may be imposed by the Commission for contempt for the violation of its rules, regulations, or orders, any person violating any of the provisions of this Act or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or violating any rule, regulation, or order of the Commission promulgated thereunder, shall be subject to a penalty of not more than One Thousand Dollars ($1000) for each and every day of such violation, and for each and every act of such violation, to be recovered in any Court of competent jurisdiction in Travis County, or in the county of the residence of the defendant or, if there be more than one defendant, in the county of the residence of any of them, or in the county in which the violation is alleged to have occurred, such suit by direction of the Commission

to be instituted and conducted in the name of the State of Texas by the Attorney General or by the county or district attorney where such suit is brought. The recovery or payment of any such penalty shall not authorize the violation of any provision of this Act, or Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation, or order of the Commission promulgated thereunder.

Any person aiding or abetting any other person in the violation of this Act, or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation, or order of the Commission promulgated thereunder, shall be subject to the same penalties as are prescribed herein for violation thereof by any such other person. (As amended Acts 1929, 41st Leg., p. 694, ch. 313, par. 4; Acts 1931, 42nd Leg., 1st C. S., p. 46, ch. 26, par. 3; Acts 1934, 43rd Leg., 3rd C. S., p. 120, ch. 64, par. 2; Acts 1935, 44th Leg., p. 180, ch. 76, par. 12.) Effective April 13, 1935.

APPENDIX B.

Taxing Act.

(ART. 7065a—1. DEFINITIONS.)

(a) "Motor Fuel" shall mean and include any volatile or inflammable liquid by whatever name such liquid may be known or sold, which is used or usable, either alone or when mixed or compounded, for the purpose of generating power for the propulsion of motor vehicles including crude petroleum, if so used. The term "motor fuel," however, shall not include the product commonly known as kerosene, nor any other distillate of, or condensate from petroleum, or any other product with a flash point above 112 degrees Fahrenheit according to the United States official closed testing cup method of the United States Bureau of Mines, except when such kerosene, distillate, condensate, or any other product, either alone or blended with motor fuel, is used in operating motor vehicles on the public highways.

(b) "Motor Vehicle" shall mean and include every vehicle operated upon the highways of this State which is propelled by the use of motor fuel.

(c) "Distributor" shall mean and include every person in this State who refines, manufactures, produces, blends or compounds motor fuel, or in any other manner acquires or possesses motor fuel and makes first sale of the same in this State; and it shall also include every person in this State who ships, transports or imports any motor fuel into this State and makes the first sale of same in this State.

(d) "First Sale" shall mean and include the first sale, distribution or use in this State of motor fuel refined, blended, imported into, or in any other manner produced in, acquired, possessed or brought into this State.

(e) "Person" shall mean and include every individual, firm, association, joint stock company, syndicate, co-partnership, corporation, trustee, agency or receiver.

(f) "Dealer" shall mean and include every person other than a distributor who engages in the business in this State of distributing or selling motor fuel within this State.

(g) "Public Highway" shall mean and include every way or place of whatever nature open to the use of the public as a matter of right for the purpose of vehicular travel.

(h) "Comptroller" shall mean Comptroller of Public Accounts of the State of Texas. (Acts 1933, 43rd Leg., p. 75, ch. 44, par. 1, as amended Acts 1935, 44th Leg., p. 558, ch. 240, par. 1.)

Effective May 11, 1935.

(Art. 7065a-2. Occupation or Excise Tax; Rate; Reports by Distributors to Comptroller.)

(a) There is hereby imposed an occupation or excise tax of four (4) cents on each gallon of motor fuel or fractional part thereof. The said tax shall accrue and be paid as hereinafter provided upon the first sale in Texas.

(b) The tax shall accrue on the first sale so that a single tax only will be collected on the same gallon of motor fuel, it being intended to impose the tax at its source in Texas, or as soon thereafter as such motor fuel may be subject to being taxed. No person, however, shall be required to

pay a tax on motor fuel imported into this State in the tank of a motor vehicle, connected with and which feeds the carburetor or substitute therefor, in quantities of thirty (30) gallons or less when such motor fuel is actually used in said vehicle, and is not extracted from said tank for sale, distribution or use... Provided, however, that any manufacturer, producer or refiner in this State may at his option, transfer the tax herein imposed upon the sale of casinghead gasoline, natural gasoline, or drip gasoline to any distributor holding a permit under the terms of House Bill 247, Chapter 44 (Arts. 7065a—1 et seq., P. C. art. 141a—1), General Laws of the Regular Session of the Forty-third Legislature, as amended by this Act; provided further, that said manufacturer, producer or refiner shall keep in Texas for a period of two (2) years a complete record of every such sale of casinghead gasoline, natural gasoline or drip gasoline, upon which the tax is so transferred, upon the form manifest prescribed in Section 8 (b) (Art. 7065a—8) of House Bill 247, Chapter 44, General Laws of the Regular Session of the Forty-third Legislature, as amended by this Act, giving full details of such sale, as provided to be given in said form manifest. The manifest shall be signed by the manufacturer, producer or refiner and the duplicate manifest shall be delivered to the person receiving the casinghead gasoline, natural gasoline or drip gasoline; provided, further, with the exception of rail shipments, every person receiving said casinghead gasoline, natural gasoline or drip gasoline, or any part of the same, shall receipt on the manifest for the quantity received by him. Provided, further, with the exception of rail shipments, said manufacturer, producer or refiner shall report each and every sale upon which the tax is so transferred, to the Comptroller within five (5) days after making the same, giving full details of such sale, as provided to be given in the form manifest aforesaid. Provided, further, that said manufacturer, producer or refiner, before making a first sale of casinghead gasoline, natural gasoline or drip gasoline to any person other than a distributor holding a permit under the terms of House Bill 247, Chapter 44, General Laws of the Regular Session of the Forty-third Legislature, as amended by this Act, shall obtain a dis-

tributor's permit and furnish a surety bond, and in all respects qualify as a distributor of motor fuel.

(c) No tax shall be imposed on any motor fuel, the imposing of which would constitute an unlawful burden on interstate commerce and which is not subject to be taxed under the Constitution of the State of Texas and the United States; and provided, that the tax imposed herein shall be in lieu of any excise or occupation tax imposed by the State or any political subdivision thereof, on motor fuel.

(d) Every distributor making first sale of motor fuel shall pay to the State of Texas an occupation or excise tax equal to four (4) cents per gallon or fractional part thereof, so sold, distributed or used, and such tax shall be due and payable at the office of the Comptroller at Austin, Texas, on the 20th day of each month, the same to be based on such sales or use made during the calendar month next preceding, and at the same time, such distributor shall make and deliver to the Comptroller a report properly sworn to and executed by such distributor or his representative in charge, on such forms as the Comptroller shall prescribe, which, among other things, shall give the number of gallons of motor fuel sold, distributed or used, intrastate and interstate, and exported during the preceding calendar month, and the number of gallons of motor fuel used, distributed or lost by fire or otherwise upon which no tax is paid. Provided also, that the said report shall include the exact quantity of crude oil or petroleum products used or consumed during the period covered by the report in the manufacturing, refining or processing of motor fuel.

(e) Provided, however, that the tax on one per cent of the taxable gallonage shall be deducted by the distributor to cover losses and the expense of complying with the provisions hereof.

(f) If any distributor, or other person, shall export or lose by fire or other accident, any motor fuel, so that the same may never be made use of within this State, after the tax has been paid on such motor fuel, claim for refund may be made in the manner hereinafter provided, or as the Comptroller may direct. However, no claim shall be made

for such loss due to any one accident or export of less than one hundred (100) gallons. Provided, however, that showing must be made that said tax was paid, and the Comptroller shall deduct from such refund made under the provisions of this Act, the one per cent allowed above.

(g) The tax herein imposed shall be posted separately from the price of the motor fuel, wherever sold in this State. (Acts 1933, 43rd Leg., p. 75, ch. 44, par. 2, as amended Acts 1935, 44th Leg., p. 558, ch. 240, par. 2.)

Effective May 11, 1935.

(Art. 7065a—7. State's Lien on Property of Distributor for Taxes, Fines, Etc.)

All taxes, fines, penalties and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated upon all the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, stocks on hand of every kind and character whatsoever used or usable in such business, including crude oil or other materials for the manufacture, refining, blending or compounding of motor fuels and the refined products therefrom and the proceeds from the sale of such materials and refined products, and any other property of every kind and character whatsoever and wherever situated devoted to such use, and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business.

If any distributor shall fail to remit proper taxes due, the Comptroller may employ auditors or other persons to ascertain the correct amount due, and if such taxes have not been properly remitted, the distributor shall pay the reasonable expenses incurred in such investigation and audit as additional penalty. Provided however, that all funds paid to the auditors of the Comptroller as expenses incurred in making audits, shall be placed in a special fund in the State Treasury, which shall be used until exhausted

for making other audits, and said sums are hereby appropriated for that purpose. Provided, that nothing herein shall prevent the Comptroller, when said fund is exhausted, from using other funds available for that purpose. (Acts 1933, 43rd Leg., p. 75, ch. 44, par. 7, as amended Acts 1935, 44th Leg., p. 558, ch. 240, par. 6.)

Effective May 11, 1935.

(Title 122, Art. 7065a—1, 2, and 7, Revised Statutes of Texas.)

APPENDIX C.

(Art. 6066a). Definition of Terms.

Section 1. (a) The word "Commission" shall mean the Railroad Commission of Texas. The phrase "order of the Commission" shall include any rule, regulation or order adopted by the Railroad Commission of Texas pursuant to the oil and gas conservation statutes of this State, including all provisions of Title 102 of the Revised Civil Statutes of Texas of 1925 and all amendments thereto.

(b) The word "oil" or phrase "crude oil" herein used shall include crude petroleum oil in its natural state as produced and crude petroleum oil from which only the basic sediment and water have been removed. The word "gas" herein used shall include natural gas, bradenhead gas, casinghead gas, and gas produced from an oil or gas well.

(c) The word "product" shall include refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, casinghead gasoline, natural gas gasoline, naphtha, distillate, gasoline, kerosene, benzine, wash oil, waste oil, blended gasoline, lubricating oil, blends or mixtures of petroleum and/or any and all liquid products or by-products derived from crude petroleum oil or gas, whether hereinabove enumerated or not.

(d) "Unlawful oil," as that term is used herein, shall include oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission, and oil which has been produced within said State in violation of any law of said State or in violation of any order of the Commission, and shall include any oil transported in violation of any such law or in violation of any such order.

(e) "Unlawful product" shall be construed to include any product any part of which was processed or derived in whole or in part from unlawful oil or from any product of unlawful oil, or from unlawful gas, or which is transported in violation of any order of the Commission or in violation of any law of Texas.

(f) "Unlawful gas" shall be construed to include gas produced or transported in violation of any order of the Commission or so produced or transported in violation of any law of Texas.

(Forfeiture of Unlawful Products; Attorney General Duties.)

SEC. 10. (a) All unlawful oil and unlawful products, regardless of the date of production or manufacture thereof, are hereby declared to be a nuisance and shall be forfeited to the State as hereinafter provided. It shall be the duty of the Commission, its servants, agents, and employees, highway patrolmen, sheriffs, constables, and peace officers, upon the discovery of any unlawful oil or unlawful products, to file immediately with the Attorney General of Texas, a report giving a description of such unlawful oil and/or unlawful products, including the ownership, party in possession, the amount, the location and classification thereof.

(b) When the Attorney General is advised from any source of the presence and existence of unlawful oil and/or unlawful products it shall be his duty to institute a suit in rem against such unlawful oil and/or unlawful products and against all persons owning, claiming or in possession thereof, such suit to be brought in the name of the State

of Texas in any court of competent jurisdiction in Travis County or in the county in which such oil or product is located. If it shall appear to the court from an examination of the petition or after hearing evidence thereon at a preliminary hearing that unlawful oil and/or unlawful products mentioned in the petition are in danger of being removed, wasted, lost, or destroyed, the court is authorized and required, in term time or in vacation, to issue restraining orders or injunctive relief, either mandatory or prohibitive, or to appoint a receiver to take charge of the oil or product in question, or to direct the sheriff of the county in which the unlawful oil or unlawful products are located to seize and impound the same until further orders of the court.

(c) Notice of pendency of such suit shall be served in the manner prescribed by law; either party to said suit may demand a trial by jury on any issue of fact raised by the pleadings and the case shall proceed to trial as other civil cases. If, upon the trial of such suit the oil or product in controversy is found to be unlawful oil or unlawful products, then the court trying said cause shall render judgment forfeiting the same to the State of Texas and authorizing the issuance of an order of sale directed to the sheriff or any constable of the county where the oil or products are located commanding such officer to seize and sell said property in the same manner as personal property is sold under execution. The court may order the oil or products sold in whole or in part as may be deemed proper and the sale shall be conducted at the court house door of the county where the oil and/or products are located and shall conform in all respects to the sale of personal property as aforesaid. The money realized from the sale of any such unlawful oil and/or products shall be applied, first, to the payment of the costs of suit and expenses incident to the sale of such oil and/or products after such expenses have been approved and allowed by the court trying the case, and all funds then remaining, shall be remitted forthwith to the State Treasurer and shall be by the Treasurer placed to the credit of the General Revenue Fund of the State of Texas.

(d) The officers of said Court shall receive the same fees provided by law for other civil actions. Provided further that the Sheriff executing said sale shall issue a bill of sale or certificate to the purchaser of said oil and/or products and the Commission shall, upon the presentation of said certificate of clearance, issue a tender, if a tender is required, permitting the purchaser of said oil and/or products to move the same into commerce. (Acts 1935, 44th Leg., p. 624, ch. 246.) (Title 102, Art. 6066a, Revised Statutes of Texas.)

Effective May 12, 1935.

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